Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

CHARLES CARLISLE,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF PETITIONER

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QUESTION PRESENTED

Whether a motion for judgment of acquittal brought under Federal Rule of Criminal Procedure 29(C) that is granted by the United States District Court should be overturned because it was filed eight (8) days after the jury's verdict?

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OPINIONS BELOW

The February 21, 1995 opinion of the court of appeals (J.A. 46-49) is reported at 48 F.3d 190. The October 27, 1993, opinion of the United States District Court for the Western District of Michigan, (J.A. 37-44) the Honorable Richard A. Enslen presiding, granting Petitioner's motion for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(C) is not reported.

JURISDICTION

On March 15, 1995, the United States Court of Appeals for the Sixth Circuit issued a judgment. That judgment reversed the judgment of acquittal of Petitioner Charles Carlisle by the United States District Court for the Western District of Michigan. This case was remanded to the District Court for reinstatement of the jury's verdict and for sentencing. The United States Supreme Court has jurisdiction to review the judgment entered by the United States Court of Appeals for the Sixth Circuit under 28 U.S.C. § 1254(1). The United States District Court for the Western District of Michigan had jurisdiction over this criminal case pursuant to 28 U.S.C. § 1331.

STATUTORY PROVISION INVOLVED

Federal Rule of Criminal Procedure 29(C) provides:

> **Motion after Discharge of Jury.** If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for

judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

STATEMENT OF THE CASE

On April 12, 1993, Petitioner Charles Carlisle was named in one count of a seven defendant criminal complaint charging conspiracy to possess marijuana with intent to distribute in violation of 21 U.S.C. §§ 841 and 846. J.A. 2. The evidence presented against Petitioner at trial was minimal. On the evening of April 10, 1993, co-defendants Dolores Rupert (the Petitioner's common law wife) and Amelia Ramon (Dolores Rupert's mother) arrived at the home shared by Petitioner and Dolores Rupert. J.A. 16. Dolores Rupert and Amelia Ramon drove to the home in a car. J.A. 16. They were followed by a truck driven by Thomas Crawford. J.A. 16. Thomas Crawford was the government's primary witness. J.A. 16. He was wearing a tape recording device. J.A. 16.

At trial, the government relied on a statement made by Dolores Rupert and a statement made by Petitioner in an attempt to link the Petitioner to the conspiracy to deliver marijuana. As soon as Amelia Ramon, Dolores Rupert and Thomas Crawford arrived at the home (and

without Petitioner Charles Carlisle present) Thomas Crawford recorded the following statement of Dolores Rupert: "Okay, just pull out and Chuck says to go down the street and just park for a while because he said he's heard over the scanner, there's some cops around here." J.A. 16. Prior to that statement the Petitioner's name had not been mentioned in the hours and hours of tape recorded conversations. After Thomas Crawford parked the truck he was introduced to the Petitioner for the first time. J.A. 17. Petitioner Charles Carlisle was silent throughout this meeting. J.A. 17. The Petitioner then made the following statements that the government relied on at trial:

Ramon:	We can park it behind the house.
Crawford:	All right mighty good.
Carlisle:	Figure right down the drive.
Ramon:	Yeah, because my son called, my grandson called and said there was cops around here.
Rupert:	around this area.
Ramon:	unintelligible
Rupert:	and we don't want to take a chance right now
Carlisle:	We don't want to take no chances.
Crawford:	No, un uh, that's why I was going, I, the speed limit was thirty and so I stayed right on it.
Ramon:	Yeah? Oh and before I forget, on the key, the combination. I took the thing off and I put it on there so . . .

Carlisle: Okay . . . is that for the back?

*** (one page later) ***

Ramon: We're going (unintelligible)

Crawford: Oh yeah it's best not take any . . .

Carlisle: No I won't take no chances . . .

Crawford: Okay. J.A. 17-18.

Petitioner drove Amelia Ramon to her home shortly after Dolores Rupert, Thomas Crawford and Amelia Ramon arrived with the truck of marijuana. J.A. 18 Thomas Crawford drove the truck containing marijuana over to Amelia Ramon's house. J.A. 18. The Petitioner then drove Thomas Crawford and Amelia Ramon to a hotel. J.A. 18. Thomas Crawford recorded the conversations the Petitioner made while the Petitioner drove them to the hotel. J.A. 18. The Petitioner did not make any incriminating statements during the trip. J.A. 18.

On appeal to the United States Court of Appeals for the Sixth Circuit the government relied upon only two statements. First, the government relied on the recorded hearsay statement of Dolores Rupert telling Thomas Crawford that the Petitioner wanted Thomas Crawford to "go down the street and just park for a while." Second, the government relied on the tape recording of the conversation about where the truck should be driven. The actual statements of the Petitioner which the government relied on are (1) "figure right down the drive", and (2) "I won't take no chances". In the hours and hours of tape recorded conversations there was no evidence that the Petitioner voluntarily joined the conspiracy. No where in the tape recorded conversations was there any evidence

that the Petitioner was involved in transporting the marijuana to Michigan. There was no evidence that the Petitioner had previously purchased or sold drugs. The Petitioner never discussed marijuana or mentioned drugs. There was no evidence that the Petitioner knew there were drugs in the truck. The Petitioner was not in close proximity to the drugs. There was no evidence of any agreement between the Petitioner and the other alleged co-conspirators. There simply was insufficient evidence of the Petitioner's involvement in the conspiracy.

On July 13, 1993, a jury convicted Petitioner Charles Carlisle of conspiracy to possess marijuana with intent to distribute in violation of 21 U.S.C. §§ 841 and 846. On July 23, 1993 the Petitioner, through his court appointed trial counsel, filed a motion for judgment of acquittal under Federal Rule of Criminal Procedure 29(C). J.A. 6. On August 19, 1993, the United States District Court for the Western District of Michigan denied the motion for judgment of acquittal finding that a rational trier of fact could find the Petitioner guilty. J.A. 15. The district court did not deny the Petitioner's motion for judgment of acquittal on the basis that the motion was untimely filed. The district court did not discuss in its written opinion the fact that the motion was filed eight business days after the jury's verdict.

Sentencing was scheduled for October 14, 1993. On October 14, 1993, the district court reversed its earlier opinion and granted Petitioner Charles Carlisle's motion for judgment of acquittal. J.A. 24. The district court found that the Petitioner was innocent after reviewing all the evidence.

The district court subsequently issued an eight page written opinion. The district court held as follows:

> The facts of this case require the same result as those in *Burgess* and *Pearce*. The government produced no evidence that Charles Carlisle entered into an agreement with any member of the conspiracy. Like the *Burgess* defendant, he was clearly present during the conspiracy, and the jury certainly could have found that he knew about it. However, in the course of hours of tape recorded conversations, no conspirators suggest that Carlisle is involved in this conspiracy. There was no evidence that he was involved in arranging the transport of the marijuana to Michigan. In fact, Crawford testified that prior to coming to Michigan he had never heard of Carlisle. Carlisle never handled the drugs or the truck which contained them, and there was no evidence that Carlisle was to benefit from the conspiracy. I find that Carlisle's hearsay statement concerning scanners, and the fact that he drove a conspirator (his common law mother-in-law) to her home, and then drove two conspirators to a hotel and dropped them off, is insufficient to establish that he knowingly and voluntarily joined the conspiracy.
>
> Viewing the evidence in the light most favorable to the government, I find that the government's case against Charles Carlisle is insufficient to prove beyond a reasonable doubt that Carlisle knowingly and voluntarily joined the conspiracy. As a result, the defendant's motion will be granted. J.A. 33-34.

The government filed an appeal with the United States Court of Appeals for the Sixth Circuit. The government contended that Petitioner's motion for judgment of acquittal should have been filed by July 22, 1993. It was filed on July 23, 1993. The government argued that the motion was filed one day late and, as a result, the Petitioner lost his right to have the district court decide his motion for judgment of acquittal. On February 21, 1995, the United States Court of Appeals for the Sixth Circuit issued a published Opinion, and reversed the judgment of acquittal because "under Rule 29, it is beyond the court's jurisdiction to grant an untimely motion for acquittal." J.A. 48. The Sixth Circuit recognized that the motion for judgment of acquittal was filed on July 23, 1994. The jury's verdict was July 13, 1994. The seven day period under Federal Rule of Criminal Procedure 29 does not include weekends. The seven day period lapsed on July 22, 1994, one day before the motion was filed. The Sixth Circuit relied on the case of *United States v Davis*, 992 F.2d 635 (1993), where the Sixth Circuit found that a district court does not have inherent supervisory power. The Sixth Circuit held that "if Carlisle had moved for acquittal within seven days of the discharge of the jury (or later, if the court so allowed during that seven day period), it would have been within the Court's jurisdiction to grant Carlisle's motion for acquittal." J.A. 48.

On May 12, 1995, Petitioner Charles Carlisle's Petition for Writ of Certiorari was docketed with the United States Supreme Court. The United States Supreme Court granted the Petition for Writ of Certiorari on September 27, 1995.

SUMMARY OF THE ARGUMENT

The issue which the United States Supreme Court must decide is whether a district court can deviate from the strict seven day time limitation for filing a motion for judgment of acquittal under Federal Rule of Criminal Procedure 29(C) in order to guarantee that an innocent defendant receives a fair trial. District courts should be given discretion to go beyond the strict time requirements of Federal Rule of Criminal Procedure 29(C) to ensure that innocent defendants receive fair trials. The power of the district courts to go beyond the strict time requirements of Federal Rule of Criminal Procedure 29(C) derives from two sources. First, the district courts have inherent supervisory power, in limited circumstances, to act outside the Federal Rules of Criminal Procedure. Second, the district courts have the power to grant an untimely motion for judgment of acquittal under 28 U.S.C. § 1651. The district courts should be given the power to go outside the strict time limits of Federal Rule of Criminal Procedure 29(C) when (1) there is a claim that the defendant was legally innocent, (2) the motion is filed prior to sentencing and (3) the motion was not timely filed because of a mistake made by the defendant's attorney.

The rationale behind the time limit established in Federal Rule of Criminal Procedure 29(C) is to prevent a district court from deciding a motion for judgment of acquittal after a considerable period of time has passed and the trial judge may not remember the particular facts of the trial. That rationale does not apply to the facts of this case where the motion for judgment of acquittal was filed eight (8) days after the trial. The strict seven day

time limit in Federal Rule of Criminal Procedure 29(C), as applied to the facts of this case, has resulted in the Petitioner being deprived of his liberty without due process of law as guaranteed by the Fifth Amendment to the United States Constitution.

ARGUMENT

I. THE DISTRICT COURTS HAVE INHERENT SUPERVISORY POWER TO ACT OUTSIDE THE FEDERAL RULES OF CRIMINAL PROCEDURE TO MAKE SURE THAT INNOCENT DEFENDANTS RECEIVE FAIR TRIALS.

The general supervisory power of the federal courts should include the ability to relieve an innocent defendant from the strict operation of the time limits under Federal Rule of Criminal Procedure 29(C). This Court has recognized that the federal courts "may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress." *United States v Hastings*, 461 U.S. 499 (1983). The purpose underlying the supervisory power of the federal courts is to provide a remedy for a violation of a defendant's rights and to preserve judicial integrity by ensuring that a conviction is valid. It is appropriate to give the district courts the authority to go outside the strict time requirements set by Federal Rule of Criminal Procedure 29(C) to ensure that an innocent man is not found guilty. In this case the district court found that the Petitioner was an innocent man. The evidence was insufficient to convict him. Allowing the district court to go outside the strict time

requirements of Federal Rule of Criminal Procedure 29(C) will preserve the integrity of the criminal justice system.

The Federal Rules of Criminal Procedure should be flexibly applied. The motion for judgment of acquittal was filed only one day late. The district court correctly ruled it had the right to consider the motion as timely filed. Federal Rule of Criminal Procedure 2 states:

> These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

The proposition that Federal Rule of Criminal Procedure 2 gives a district court the inherent authority to enter a judgment of acquittal was set forth in *United States v Broadus*, 664 F. Supp. 592, 596-597 (D.D.C. 1987):

> Most important, Rule 2 of the Federal Rules of Criminal Procedure sets out the purposes of the criminal rules. Rule 2 mandates that a court ensure "the just determination of every criminal proceeding" if it is to conform to the Federal Rules. Fed.R.Crim.P.2. Rule 2 demands that a Court attend both to the needs of the individual litigants and to the public at large and approach procedural problems flexibly so that justice, fairness in administration, and efficiency are accommodated. *See, e.g., Fallen v. United States*, 378 U.S. 139, 142, 84 S.Ct. 1689, 1691-92, 12 L.Ed.2d 760 (1964); *Warren v United States*, 358 F.2d 527, 530 (D.C.Cir.1965); *see also* C.A. Wright, *Federal Practice and Procedure:* Criminal § 32 (1982 and Supp.1986).

> Rule 2 is the criminal procedure analogue to Fed.R.Civ.P.1, see *Advisory Committee Note to Rule 2*, which requires a court confronted with a civil case to place justice ahead of an unyielding fealty to the words of the rules. If the words of the civil rules cannot be used to defeat justice, *Cook v Boorstin*, 763 F.2d 1462, 1472 (D.C.Cir.1983); *Hormel v Helvering*, 312 U.S. 552, 557, 61 S.Ct. 719, 721-22, 85 L.Ed. 1037 (1941), a seemingly plausible inference from a criminal rule cannot command blind adherence if it would deprive an accused person, for whom the stakes are so very much higher than a civil litigant, of a just determination of his or her cause. Thus, Fed.R.Crim.P.2 implies that a trial court is *obligated* to ensure that every guilty verdict is supported by at least some evidence on every element of the crime charged.
>
> . . . .
>
> The Rules of Criminal Procedure cannot elevate form over substance to the point where considerations of efficiency are irrelevant and a trial court is deemed powerless to review a conviction that would fall upon collateral attack. A rule of law such as this, which would so wrongfully waste judicial resources, which would result in a great loss of time and money to a possibly wronged defendant, and which would fail to serve the public's interest in speedy, fair, and resource-efficient criminal justice, would be utterly at odds with the commands of Rule 2. *See, e.g., IV American Bar Association Standards for Criminal Justice* 22-2.1 (1980).

This Court has affirmed a district court's use of its supervisory powers to require a disclosure of a witness statement not required by the Federal Rules of Criminal

Procedure. *United States v Nobles*, 422 U.S. 225 (1975). This Court has recognized that the goal of the criminal justice system is make sure "that guilt shall not escape or innocence suffer," *Berger v United States*, 295 U.S. 78, 88 (1935). Innocence would suffer in this case if the district court is completely restricted by the seven day time limits of Federal Rule of Criminal Procedure 29(C). The Petitioner's court appointed trial attorney missed the deadline by one day. The Petitioner should not be made to suffer because of his attorney's mistake. The Petitioner would be left only with an appeal to the court of appeals. He would be sentenced and possibly incarcerated prior to the appeal being decided. The appeal would be decided by three judges who did not hear or see the witnesses testify at trial. The Petitioner would have the heavy burden of convincing the court of appeals that the jury's verdict was in error. The Petitioner would have to persuade the court of appeals that no "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v Virginia*, 443 U.S. 307, 319 (1979). The Petitioner's chance of convincing the court of appeals that the evidence was insufficient to convict him is almost nonexistent without the district court's decision in his favor.

The proposition that the federal courts have supervisory powers to protect substantial rights is supported by *Gaca v United States*, 414 U.S. 618 (1973). In *Gaca*, the defendant's appeal was dismissed because of his failure to pay a $25 filing fee. The government agreed that a remand was appropriate "to reinstate the appeal in the exercise of this Court's supervisory powers in order to avoid possible injustice and the possibility of collateral

attack upon the conviction." *Id.* An innocent defendant, like the Petitioner in this case, could collaterally attack his or her conviction under 28 U.S.C. § 2255. It would be wasteful for all the parties (the federal courts, the government and the Petitioner) to require that a legally innocent person be imprisoned and forced to pursue collateral relief. The motion under 28 U.S.C. § 2255 could only be filed after sentencing because the moving party under 28 U.S.C. § 2255 must be a "prisoner in custody under sentence of a court." There are two possible results once a motion under 28 U.S.C. § 2255 is filed. The motion could be granted or denied. If the motion under 28 U.S.C. § 2255 is denied, the criminal justice system is faced with the intolerable prospect of the continued jailing of a legally innocent individual. If the motion under 28 U.S.C. § 2255 is granted, the ridiculous result is that a district court is denied the power to grant relief to an innocent person eight days after trial but the district court, after sentencing, after a hearing on a 28 U.S.C. § 2255 motion and after the innocent person is imprisoned, may then grant the appropriate relief. Under either result, it is far better for a district court to decide the motion initially under Federal Rule of Criminal Procedure 29.

It will be difficult for the Petitioner to prevail on a collateral attack of his conviction. This Court has established rules that make it more difficult for a defendant to upset a conviction by collateral, as opposed to direct, attack. In *United States v Frady*, 456 U.S. 152, 165 (1982), this Court held "an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." In *Murray v Carrier*, 477 U.S.

478, 487-488 (1986), this Court ruled that a habeas petitioner cannot avoid procedural default by asserting merely that his counsel made a significant error. This Court concluded that as "long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland v Washington*, we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default." In this case there is a clear inequity. The Petitioner could lose if he collaterally attacks his conviction because he has to "bear the risk of attorney error." The Petitioner, who has been found innocent by the district court, would be denied relief.

In *Brock v Pierce County*, 476 U.S. 253 (1986), this Court held that, despite statutory language that the Secretary of Labor shall issue a final determination of misuse of funds within 120 days after audit or receipt of a complaint of misuse, the Secretary of Labor does not lose power to recover misused funds after 120 days. This Court held:

> We would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake. When, as here, there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act. *Id.* at 261.

In this case, there is much more involved than merely money. The Petitioner is a decorated war veteran with no prior record. Fundamental rights are at stake. It should

not be assumed that the district court lost its power to act eight days after the jury's verdict.

In *Arizona v Manypenny*, 672 F.2d 761 (9th Cir. 1982), the defendant was a United States border patrolman. He was charged with a criminal assault on an illegal alien under Arizona law. The defendant removed the prosecution to the district court under 28 U.S.C. § 1442. The defendant's attorney made a decision not to raise the federal immunity defense at trial. The defendant was convicted. The defendant timely filed a motion for judgment of acquittal based on insufficiency of the evidence under Federal Rule of Criminal Procedure 29. The district court denied the motion. The defendant subsequently filed a motion for new trial under Federal Rule of Criminal Procedure 33 and under Federal Rule of Criminal Procedure 34 alleging that the court lacked jurisdiction because state law could not govern the acts of a federal official under the circumstances of the case. The district court treated the Federal Rule of Criminal Procedure 34 motion as a Federal Rule of Criminal Procedure 29(C) motion and granted the motion. The district court found that it had committed "fundamental error" by not granting the original motion for a new trial under Federal Rule of Criminal Procedure 29(C).

In an opinion by Justice Kennedy, the United States Court of Appeals for the Ninth Circuit held:

> We conclude that a federal district court, which has properly retained jurisdiction of a case, has the power to grant a verdict of acquittal, before or after submission of the question of a defendant's guilt to the jury, if necessary to correct a manifest error. There are limits on this authority,

cf. *United States v Smith*, 331 U.S. 469, 67 S.Ct. 1330, 91 L.Ed. 1610 (1947), and its exercise is reviewable in the Court of Appeals. To resolve this case, we need only hold that a court has power to reconsider a timely motion for judgment of acquittal premised on insufficiency of the evidence when the court, which still retains jurisdiction of the case, decides, in considering another of defendant's motions, that its earlier denial of the Rule 29 motion was erroneous. We do not address the scope of inherent power in other contexts.

In this case, Petitioner Charles Carlisle's trial counsel filed a Motion under Federal Criminal Procedure 29(C) one day late. The district court should have the power, prior to imposing sentencing, to correct a fundamental error which it has made. This power would be reviewable by the court of appeals.

Other circuits have recognized that a defendant should not be completely prejudiced when a motion for judgment of acquittal is filed only one day late. For example, in *United States v Coleman*, 811 F.2d 804, 807 (3rd Cir. 1986), the United States Court of Appeals for the Third Circuit held:

> However, the same result does not necessarily obtain for a motion of acquittal under Rule 29. In *United States v Giampa*, 758 F.2d 928, 936 n. 1 (3d Cir. 1985), this court specifically held that a district court may enter a judgment of acquittal "*sua sponte* under its inherent power," without regard to the seven-day requirement of Rule 29. *See also United States v. Wright-Barker*, 784 F.2d 161 (3d Cir. 1986) (reiterating *Giampa's* holding as to court's inherent power, but refusing to

> define limits of this power). This inherent power to enter a judgment of acquittal does not extend to judgments granting a new trial because such judgment, entered *sua sponte* by the court, might place the defendant twice in jeopardy. Even though the government may appeal an acquittal in some instances, the defendant will never face a new trial after such an appeal.
>
> Here, although the district court entered a judgment of acquittal on Del Bono's motion for acquittal, and not *sua sponte*, it would be inconsistent to hold that the court's inherent power to grant an acquittal out of time *sua sponte* does not extend to those occasions when a motion is made and granted. Accordingly, Del Bono's acquittal cannot be reversed for such a procedural deficiency, and we must now consider the merits of the appeal.

In *United States v DiBernardo*, 880 F.2d 1216, 1225, FN4 (11th Cir. 1989), the United States Court of Appeals for the Eleventh Circuit held:

> The rules of criminal procedure, of course, do not demarcate the outer limits of a trial court's authority to vacate a judgment of conviction. Under its inherent supervisory power, a district court may consider an untimely post-trial motion for judgment of acquittal or may grant such a motion sua sponte to correct manifest error when it retains jurisdiction over the case. *See United States v. Coleman*, 811 F.2d 804, 806-07 (3d Cir.1987); *Arizona v Manypenny*, 672 F.2d 761, 764-65 (9th Cir.) *cert. denied*, 459 U.S. 850, 103 S.Ct. 111, 74 L.Ed.2d 98 (1982); *United States v Doherty*, 675 F. Supp. 726, 729 (D.Mass. 1987); *United States v. Broadus*, 664 F. Supp. 592, 595-98 (D.D.C. 1987). The rules must be applied flexibly

"to provide for the just determination" of every case and must be construed "to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." Rule 2, Fed. R.Crim.P.; *see Fallen v United States*, 378 U.S. 139, 142, 84 S.Ct. 1689, 1691, 12 L.Ed.2d 760 (1964); *United States v Mendoza*, 565 F.2d 1285, 1288-90 (5th Cir.1978). Thus, if a district court has jurisdiction over a case, then the interests of justice demand that it review the sufficiency of the evidence for conviction without regard to the technicalities of pleadings. *See Ansley v. United States*, 135 F.2d 207, 208 (5th Cir. 1943).

This Court, in interpreting Federal Rule of Criminal Procedure 29(C), should attempt to reach a result that is fair and just. It is not fair and just to completely bar the district court's review of the Petitioner's motion for judgment of acquittal because it was filed eight days after the jury's verdict. The trial judge had the facts of the trial fresh in his mind when he made the decision to grant the Petitioner's motion for judgment of acquittal. The government has not advanced any compelling reason why the district court should not have been allowed to hear the motion for judgment of acquittal filed one day late. The only reason advanced by the government is that the motion was not timely filed. The government was not prejudiced in any way by the district court's decision to consider the motion. The just and fair result is to allow district courts to exercise their inherent supervisory power to hear untimely motions under Federal Rule of Criminal Procedure 29(C) when (1) the motion is filed prior to sentencing, (2) the defendant claims he is actually

innocent and (3) the motion was not timely filed because of a mistake made by the defendant's attorney.

II. THE RATIONALE BEHIND THE TIME LIMIT ESTABLISHED IN FEDERAL RULE OF CRIMINAL PROCEDURE 29(C), TO PREVENT HAVING A TRIAL JUDGE DECIDE A MOTION FOR JUDGMENT OF ACQUITTAL AFTER A CONSIDERABLE PERIOD OF TIME HAS PASSED AND THE TRIAL JUDGE MAY NOT REMEMBER THE PARTICULAR FACTS OF THE TRIAL, DOES NOT APPLY TO THE FACTS OF THIS CASE WHERE THE MOTION FOR JUDGMENT OF ACQUITTAL WAS FILED EIGHT (8) DAYS AFTER THE TRIAL.

There are two questions which this Court should address in deciding whether to strictly enforce Federal Rule of Criminal Procedure 29(C). First, what prejudice is there to the government? On this issue, it certainly cannot be argued that there was any prejudice to the government. The motion was filed only one day late. This extra day created no prejudice to the government.

The second question this Court should address is what is the purpose behind Federal Rule of Criminal Procedure 29(C)? The purpose behind the rule, as identified in *United States v Smith*, 331 U.S. 469 (1947), is to avoid having a trial judge decide a motion after a considerable period of time has passed. After a considerable period of time has passed the trial judge may not remember the particular facts of the trial. When there is a considerable period of time (not eight days) there is a legitimate reason to not allow a district court to decide the motion and grant a new trial.

In this case the district court ruled as follows:

> Rule 29(C) allows defendants seven days after the jury is discharged, "or within such further time as the court may fix during the 7-day period," to bring a motion for judgment of acquittal. The government correctly points out that this deadline occurred on July 22 in this case, but defendant's motion was filed on July 23. However, I can conceive of no prejudice to the United States which will result from consideration of a motion that is one day late in this case. Because I believe that refusal to hear this motion would result in grave injustice, and because the Rule permits the Court to extend the deadline, I will consider this motion as if it were filed in a timely manner. (Page 1 of the District Court's October 28, 1993 Opinion found at J.A. 37.)

The purposes behind Federal Rule of Criminal Procedure 29(C) would not be served by applying the strict requirements of the rule to the facts of this case. The Petitioner's trial attorney mistakenly filed the motion for judgment of acquittal one day late. The Petitioner should not be completely prejudiced by his court appointed attorney's mistake. The district courts have available to them less drastic sanctions to enforce Federal Rule of Criminal Procedure 29, as opposed to completely denying a defendant his or her right to have a motion for judgment of acquittal decided. If the delay is the fault of defense counsel, as in this case, the district courts have the authority to appropriately sanction defense counsel. The severe penalty of refusing a defendant his or her right to have a motion for judgment of acquittal decided

should not be invoked where the motion is filed one day late.

In *United States v Smith*, the defendant was convicted of tax evasion. The defendant timely filed a motion for new trial which was denied by the trial judge. The defendant appealed to the United States Court of Appeals for the Third Circuit. The Third Circuit affirmed the conviction and held there was no error in the proceedings. A petition for certiorari was denied by the United States Supreme Court in *Memolo v United States*, 327 U.S. 800 (1946). The United States Court of Appeals for the Third Circuit then issued its mandate of affirmance and the defendant was taken into custody. On the same day that the defendant was taken into custody the trial judge entered an order vacating the judgment and granting a new trial to the defendant. The trial judge did not give any reason for granting the motion for a new trial other than that it was in the interest of justice. This Court reversed the decision of the trial judge and reinstated the conviction. This Court reasoned as follows:

> Support for the interpretation urged by respondent rises from fear of miscarriage of justice. New trials, however, may be granted for error occurring at the trial or for reasons which were not part of the court's knowledge at the time of judgment. For the latter, the Rules make adequate provision. Newly-discovered evidence may be made ground for motion for new trial within two years after judgment. Rule 33. For the former, *habeas corpus* provides a remedy for jurisdictional and constitutional errors at the trial without limit of time. Johnson v Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461, 146 A.L.R.

357; Walker v Johnston, 312 U.S. 275, 61 S.Ct. 574, 85 L.Ed. 830; Waley v Johnston, 316 U.S. 101, 62 S.Ct. 964, 86 L.Ed. 1302; Adams v United States ex rel. McCann, 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 268, 143 A.L.R. 435. Possibility of unredressed injustice therefore remains only in prejudicial happenings during trial. The trial judge is given power by the Rules to entertain motions for new trial within five days after verdict and may extend that time for so long as he thinks necessary for proper consideration of the course of the trial. But extension of that time indefinitely is no insurance of justice. On the contrary, as time passes, the peculiar ability which the trial judge has to pass on the fairness of the trial is dissipated as the incidents and nuances of the trial leave his mind to give way to immediate business. It is in the interest of justice that a decision on the propriety of a trial be reached as soon after it has ended as is possible, and that decision be not deferred until the trial's story has taken on the uncertainty and dimness of things long past. 67 S.Ct. at pages 1333-1334.

This case is easily distinguished from *United States v Smith* for at least two important reasons. First, the Petitioner in this case, in the considered opinion of the district court, is guilty of no crime. The Petitioner is innocent. Second, the Petitioner's motion for judgment of acquittal was granted before sentencing, not after the appeal was decided. This Court should distinguish *United States v Smith* and hold that an untimely motion under Federal Rule of Criminal Procedure 29(C) may be heard by the district court if (1) the motion is made prior to sentencing, (2) the motion was not timely filed because of

an attorney's mistake and (3) there is a claim that the defendant is actually innocent.

In *United States v Smith*, this Court implied that Federal Rule of Criminal Procedure 33 (which allows for a motion to be made on the basis of newly discovered evidence within two years after judgment) or a habeas corpus petition would adequately protect a defendant's rights. A motion for new trial under Federal Rule of Criminal Procedure 33 would not protect the Petitioner's rights in this case because there was no newly discovered evidence. A petition for habeas corpus, filed pursuant to 28 U.S.C. § 2255, would have been premature in this case because only a "prisoner in custody under sentence of a court" may file a Motion under 28 U.S.C. § 2255. If the Petitioner filed a motion under 28 U.S.C. § 2255 after sentencing and after he was placed in custody, to obtain collateral relief the Petitioner would have to "clear a significantly higher hurdle than would exist on direct appeal." *United States v Frady*, 456 U.S. 152, 166 (1982). This Court should rule that district courts have the discretion to hear motions under Federal Rule of Criminal Procedure 29(C) prior to sentencing to protect innocent defendants.

III. THE DISTRICT COURTS HAVE THE POWER TO GRANT AN UNTIMELY MOTION FOR JUDGMENT OF ACQUITTAL UNDER 28 U.S.C. § 1651.

The district courts have the power to grant an untimely motion for judgment of acquittal under 28 U.S.C. § 1651. In *La Buy v Howes Leather Co.*, 352 U.S. 249, 259 (1957) this Court spoke of the "supervisory control of

the District Courts by the Court of Appeals" under 28 U.S.C. § 1651. 28 U.S.C. § 1651 provides:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law.
>
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

Under 28 U.S.C. § 1651, the district courts have the power to grant writs of *coram nobis*. In *United States v Smith*, at footnote 4, the United States Supreme Court stated as follows:

> Although this Court has reserved decision on whether the federal district courts are empowered to entertain proceedings in the nature of *coram nobis* "to bring before the court that pronounced the judgment errors in matters of fact which had not been put in issue or passed upon, and were material to the validity and regularity of the legal proceeding itself. * * * " United States v Mayer, 235 U.S. 55, 68, 35 S.Ct. 16, 19, 59 L.Ed. 129, it is difficult to conceive of a situation in a federal criminal case today where that remedy would be necessary or appropriate. Of course, the federal courts have power to investigate whether a judgment was obtained by fraud and make whatever modification is necessary, at any time. Universal Oil Products Co. v Root Refining Co., 328 U.S. 575, 66 S.Ct. 1176, 90 L.Ed. 1447. When the draftsmen of the Rules of Civil Procedure, adopted long before the Criminal Rules, wanted to give the trial judge power to grant a new trial on his own initiative, they did so in express words. Rule 59(d), Rules of Civil Procedure, 28 U.S.C.A. following section 723c.

The facts of this case justify a holding by the United States Supreme Court that the district courts should have the power to entertain proceedings in the nature of *coram nobis*. The writ of *coram nobis* should be used by the district courts in extraordinary situations to protect innocent defendants. This case represents such an extraordinary situation. The Petitioner has been found innocent by the district court. The only reason the Petitioner comes to this Court as a guilty defendant is because his trial counsel missed the deadline to file a motion for judgment of acquittal by one day. There is a judgment error in this case that is material to the validity and regularity of the legal proceeding itself.

The Federal Rules of Criminal Procedure should not be narrowly construed so as to eliminate any discretion which the district courts may have. This Court should hold that the district courts have the power through a writ of *coram nobis* to correct fundamental errors in a criminal trial, such as occurred in this case. That power, if conferred upon the district courts, is certainly not without limits. If a district court uses the power in a manner or form that is not designed to correct a fundamental error in the proceedings, such as occurred in this case, the abuse of that power by the district court can be cured on appeal. The power could be limited to situations where (1) the motion is filed prior to sentencing, (2) the defendant's claim is time barred because of counsel's mistake, and (3) a claim is made that the defendant is actually innocent.

IV. THE STRICT SEVEN DAY TIME LIMIT IN FEDERAL RULE OF CRIMINAL PROCEDURE 29(C), AS APPLIED TO THE FACTS OF THIS CASE, HAS RESULTED IN THE PETITIONER BEING DEPRIVED OF HIS LIBERTY WITHOUT DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In *Herrera v Collins*, 113 S.Ct. 853 (1993) the defendant was convicted in state court of murder and sentenced to death. Ten years after his conviction the defendant alleged in his second federal habeas proceeding that newly discovered evidence would prove he was actually innocent of the murder. This Court described the historical background of motions for new trial:

> The Constitution itself, of course, makes no mention of new trials. New trials in criminal cases were not granted in England until the end of the 17th century. And even then, they were available only in misdemeanor cases, though the writ of error *coram nobis* was available for some errors of fact in felony cases. Orfield, New Trial in Federal Criminal Cases, 2 Vill.L.Rev. 293, 304 (1957). The First Congress provided for new trials for "reasons for which new trials have usually been granted in courts of law." Act of Sept. 24, 1789, ch. 20, § 17, 1 Stat. 83. This rule was early held to extend to criminal cases. See *Sparf and Hansen v United States*, 156 U.S. 51, 175, 15 S.Ct. 273, 321, 39 L.Ed. 343 (1895) (Gray, J., dissenting) (citing cases). One of the grounds upon which new trials were granted was newly discovered evidence. See F. Wharton, Criminal Pleading and Practice §§ 854-874, pp. 584-592 (8th ed. 1880).

The early federal cases adhere to the common-law rule that a new trial may be granted only during the term of court in which the final judgment was entered. See, e.g., *United States v Mayer*, 235 U.S. 55, 67, 35 S.Ct. 16, 18, 59 L.Ed. 129 (1914); *United States v Simmons*, 27 F.Cas. 1080, (No. 16,289) (CCEDNY 1878). Otherwise, "the court at a subsequent term has power to correct inaccuracies in mere matters of form, or clerical errors." 235 U.S., at 67, 35 S.Ct., at 19. In 1934, this Court departed from the common-law rule and adopted a time limit – 60 days after final judgment – for filing new trial motions based on newly discovered evidence. Rule II(3), Criminal Rules of Practice and Procedure, 292 U.S. 659, 662. Four years later, we amended Rule II(3) to allow such motions in capital cases "at any time" before the execution took place. 304 U.S. 592, 592 (1938) (codified at 18 U.S.C. § 688 (1940)).

There ensued a debate as to whether this Court should abolish the time limit for filing new trial motions based on newly discovered evidence to prevent a miscarriage of justice, or retain a time limit even in capital cases to promote finality. See *Orfield, supra*, at 299-304. In 1945, we set a two-year time limit for filing new trial motions based on newly discovered evidence and abolished the exception for capital cases. Rule 33, Federal Rules of Criminal Procedure, 327 U.S. 821, 855-856 ("A motion for new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment"). We have strictly construed the Rule 33 time limits. Cf. *United States v Smith*, 331 U.S. 469, 473, 67 S.Ct. 1330, 1332, 91 L.Ed. 1610 (1947). And the Rule's treatment of new trials

based on newly discovered evidence has not changed since its adoption. 113 S.Ct. at pages 864-865.

In *Herrera v Collins*, the defendant argued that the Fourteenth Amendment's guarantee of due process entitled him to a new trial if he was actually innocent. This Court held:

> In light of the historical availability of new trials, our own amendments to Rule 33, and the contemporary practice in the States, we cannot say that Texas' refusal to entertain petitioner's newly discovered evidence eight years after his conviction transgresses a principle of fundamental fairness "rooted in the traditions and conscience of our people." *Patterson v New York*, 432 U.S., at 202, 97 S.Ct., at 2322 (internal quotation marks and citations omitted). 113 S.Ct. at page 866.

The refusal of the court of appeals to allow the Petitioner's motion for judgment of acquittal filed eight days after the jury's verdict to be decided by the district court does transgress a principle of fundamental fairness rooted in the traditions and conscience of our people. The Due Process Clause of the Fifth Amendment provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . . " Under the facts of this case, the Petitioner has been denied due process because he has been denied the right to have the trial judge, who heard all the evidence in this case, decide prior to sentencing if the evidence was sufficient to convict him. The Due Process Clause prevents the government from engaging in conduct that "shocks the conscience," *Rochin v. California*, 342 U.S. 165, 172 (1952),

or interferes with rights "implicit in the concept of ordered liberty". *Palko v Connecticut*, 302 U.S. 319, 325-326 (1937). In determining whether Federal Rule of Criminal Procedure 29(C), under the facts of this case, violates the Due Process Clause this Court should determine "whether the rule transgresses any recognized principle of 'fundamental fairness' in operation." *Medina v California*, 112 S.Ct. 2572, 2577 (1992). Federal Rule of Criminal Procedure 29(C) does transgress recognized principles of fundamental fairness as it is applied to the facts of this case. There is no rational reason why a trial judge should not be able to decide a motion for judgment of acquittal filed eight days after the jury's verdict. The government has not even argued that it was prejudiced by the late filing. It is true that "the passage of time only diminishes the reliability of criminal adjudications." *Herrera v Collins*, 113 S.Ct. at page 862. Eight days is not such a passage of time that would cause this Court to question the reliability of the district court's decision to grant the Petitioner's motion for judgment of acquittal.

CONCLUSION

This Court should hold that an untimely motion for judgment of acquittal brought by an innocent defendant under Federal Rule of Criminal Procedure 29(C) that is filed prior to sentencing can, in the discretion of the district court, be heard and decided to reach a fair and just result. In the alternative, this Court should hold that an untimely motion for judgment of acquittal brought under Federal Rule of Criminal Procedure 29(C) may be heard by the district court to correct a fundamental error

in the proceeding. This Court should rule that the federal trial courts have the inherent supervisory power to go outside the strict time limits established in Federal Rule of Criminal Procedure 29(C) only when (1) there is a claim that the defendant was legally innocent, (2) the motion is filed prior to sentencing and (3) the time limit was not met because of a mistake made by the defendant's attorney. The district court's power to entertain the untimely motion comes from the inherent supervisory power of the district courts. The district court's power to decide the untimely motion also comes from the district court's ability to hear a writ of *coram nobis*. If this Court holds that the district court did not have the authority to decide the motion that was filed one day late, this Court should hold that Federal Rule of Criminal Procedure 29(C), as applied to the facts of this case, violates the Fifth Amendment to the United States Constitution. For the reasons set forth above, the Supreme Court of the United States should reverse the Judgment and Opinion of the Sixth Circuit Court of Appeals dated February 21, 1995, and reinstate the Opinion and Judgment of the United States District Court for the Western District of Michigan dated October 28, 1993.

Respectfully Submitted,

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